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Grant D. Green 440 San Domingo Way Los Altos, CA 94022-2143			WEINSTEIN, STEVEN L	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte GRANT D. GREEN

Appeal 2008-1007
Application 09/777,418
Technology Center 1700

Decided: June 12, 2008

Before THOMAS A WALTZ, CATHERINE Q. TIMM, and
JEFFERY T. SMITH, *Administrative Patent Judges*.

WALTZ, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant seeks review under 35 U.S.C. § 134 from the Examiner's rejections in the final Office Action dated Mar. 22, 2004. This Board has jurisdiction under 35 U.S.C. § 6(b).

The invention is directed to an article comprising a package containing a pre-measured volume of brown sugar. Claim 1 is illustrative and is reproduced below.

1. An article of manufacture, comprising: a pre-measured portion of brown sugar, enclosed in a suitable container, wherein said brown sugar comprises loosely-packed brown sugar, and said pre-measured portion is an amount equivalent to a pre-measured quantity of firmly-packed brown sugar.

The Examiner relies on the following prior art as evidence of unpatentability.

Pichardo	2,745,751	May 15, 1956
Saulsbury	4,335,609	June 22, 1982
Slagg	4,840,239	June 20, 1989

Womans Day Encyclopedia of Cookery 1784 (Fawcett Publ. 1966)
Family Circle Illus. Lib. of Cooking 479-80 (1972)

Other Late News, Advertising Age, August 21, 1978, at 65
Snacks, Baking Mixes and a New Form of Brown Sugar, Star Tribune,
November 22, 1989, at 04T
Sweeteners, Institutional Distribution, May 15, 1991, at 158
Waxler, Caroline, *Sweet Stuff*, Forbes, June 2, 1997, at 196
Smith, Jamie, Obit, *James Allen Moore, 83, Domino Sugar manager*,
Hospital, Church Volunteer, Baltimore Morning Sun, Aug. 4, 1997, at 5B

Claims 1-3, 8-10, 19, and 21-24 are pending in the application and stand rejected. Claims 4-7, 11-18, and 20 are cancelled. Appellant seeks review of the rejections of the pending claims from the final Office Action, dated March 22, 2004, as stated below:

Claims 1-3, 8-10, 19, and 21-24 stand rejected under 35 U.S.C. § 103(a) as obvious over Institutional Distribution and Star Tribune, in view of Womans Day Encyclopedia of Cookery, Family Circle, Illus. Lib. of

Cooking, Advertising Age, Saulsbury, and Slagg, and further in view of Pichardo, Forbes, and Baltimore Sun (Ans. 4).¹

ISSUE ON APPEAL

Has Appellant shown that the Examiner reversibly erred in rejecting the pending claims as obvious in view of the prior art as a whole?

FINDINGS OF FACT (FF)

1. Institutional Distribution discloses that turbinado sugar is a crystalline sugar that is derived from raw cane sugar, which is washed to remove impurities. It still retains some color (off-white to tan) and flavor of the raw cane sugar. It is available in single-service, two-teaspoon packets for table use. Institutional Distribution at 160.

2. Pichardo discloses a food packaging kit, providing multiple compartments 12 for containing powdered ingredients for preparing a beverage, such as instant coffee. Col 1, ll. 15-18. It discloses a package 10 comprising a plurality of compartments 12, 14, 18, 20, and 22 which contain the powdered ingredients. Col. 2, ll. 3-12. Compartment 18 contains 1 tsp. of sugar, while compartments 20, 22 each contain $\frac{1}{2}$ teaspoon of sugar. Col 2, ll. 9-12. By selecting various compartments to open, a person may dispense $\frac{1}{2}$, 1, 1-1/2 or 2 teaspoons of sugar. Col 2, ll. 27-31. The invention has compartments arranged end-to-end and laterally on the package, separated by perforations. *See* Figs. 2, 3.

¹ We refer to and cite from the Examiner's Answer dated Dec. 28, 2006.

PRINCIPLES OF LAW

Under 35 U.S.C. § 103(a), the question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results. *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1734 (2007). When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, §103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill. *Id.* at 1740.

“When prima facie obviousness is established and evidence [of secondary considerations] is submitted in rebuttal, the decision maker must start over. … Prima facie obviousness is a legal conclusion, not a fact. Facts established by rebuttal evidence must be evaluated along with the facts on which the earlier conclusion was reached, not against the conclusion itself. … [A] final finding of obviousness may of course be reached, but such finding will rest upon evaluation of all facts in evidence, uninfluenced by any earlier conclusion reached by an earlier board upon a different record.” *In re Rinehart*, 531 F.2d 1048, 1052 (CCPA 1976). “Case law

requires that a nexus be established between the merits of the claimed invention and the evidence proffered on secondary considerations, if the evidence on secondary considerations is to be given substantial weight in the calculus of obviousness/nonobviousness.” *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 305 n. 42 (Fed. Cir. 1985).

ANALYSIS

Claim 1

In the final Office Action, the Examiner relies primarily on Institutional Distribution, noting that it discloses single-service packets of turbinado sugar, each packet containing a volumetric quantity of two teaspoons. Turbinado sugar is a crystalline sugar which is partially refined from raw cane sugar. According to the Examiner, Institutional Distribution teaches suitable containers containing brown sugar in pre-measured volume portion. Ans. 5, *see* FF 1.

Appellant contends that turbinado sugar is outside the scope of the claim term “brown sugar” as defined in the Specification. Appellant contends that “brown sugar” excludes sugar that has been granulated or otherwise treated to avoid caking. Appellant also contends that turbinado sugar “apparently” pours freely. App. Br. 8². While Appellant correctly cites the limitation from the Specification on the definition of “brown sugar” as being granulated or otherwise treated to avoid caking, Appellant overlooks the fact that, regardless, the Specification explicitly includes

² We cite from and refer to the Second Amended Appellant’s Brief, filed July 20, 2006.

turbinado sugar as a form of and within the scope of the term “brown sugar.” Spec 2, l. 29 (“The term ‘brown sugar’ as used herein refers to turbinado sugar.”) While the Examiner relies on other prior art for the § 103 rejection of claim 1,³ we determine that Institutional Distribution alone teaches all the elements of claim 1.⁴ This reference teaches a pre-measured portion (two teaspoons) of brown sugar (turbinado sugar) in a suitable container (single-service packets). FF 1. In general, packaging brown sugar in containers of various weights was known to a person of ordinary skill in the art at the time the invention was made. *See* Spec. 1. Claim 1 is further limited to “loosely packed” brown sugar. As noted by the Examiner, Institutional Distribution describes loosely packaged sugar, Ans. 4, with which we agree. From the disclosure in Institutional Distribution, one skilled in the art would understand that sugar must be free flowing, i.e., not packed, to be able to fill and be sealed within single serving packets.

Claim 1 contains a further limitation, to wit, “and said pre-measured portion is an amount equivalent to a pre-measured quantity of firmly-packed brown sugar.” As we construe this term, we fail to see how it further limits the claimed subject matter. We determine that any volumetric quantity of brown sugar, as well as any other particulate material, would have both a loosely-packed and a firmly-packed bulk density. Regardless of the nature

³ The additional prior art cited by the Examiner, *supra*, further establishes that the prior art, as a whole, establishes each and every element of the claim for packaging brown sugar to be known to a person of ordinary skill in the art. *See* Ans. 10-11. “A person of ordinary skill is also a person of ordinary creativity, not an automaton.” *KSR Int’l*, 127 S.Ct. at 1742.

⁴ While the rejection of claim 1 was for obviousness under § 103, rather than anticipation under § 102, anticipation is the epitome of obviousness. *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983)

or characteristics of the brown sugar as packaged, it would inherently have an equivalent firmly packed volume. Therefore, we determine that this limitation reads on turbinado sugar, which is disclosed in Institutional Distribution, regardless of whether this sugar clumps or not. We refuse to further limit this claim by any embodiment in the Specification, e.g., involving labeling the package with the equivalent firmly-packed volume. *See* Spec. 4, ll. 9-18. For the foregoing reasons, we determine that Appellant has failed to show that the Examiner committed reversible error in rejecting claim 1 as obvious over the applied prior art.

Wherefore, the rejection of claim 1 as obvious under 35 U.S.C. § 103(a) is sustained.

Claim 19

Claim 19 comprises the same elements as claim 1, but having a further limitation that the invention “comprises a plurality of bags.” In his Brief, Appellant appears to address the rejection of this claim with the statement, “none of the cited references disclose or suggest providing brown sugar in a plurality of individual portions.” App. Br. 11. We disagree. A plurality simply means more than one. Pichardo discloses a food package kit, comprising multiple or plural compartments 12 for providing powdered food ingredients, such as powdered creamer, coffee, and sugar for a single serving of instant coffee. FF 2. While Pichardo likely intends white, rather than brown sugar, this difference is immaterial, as Pichardo is analogous art, directed to the same field as Appellant’s invention, namely food packaging. Appellant has presented no evidence that one of ordinary skill in this art would not use brown sugar in place of the white sugar disclosed by Pichardo. A person of ordinary skill in the art would have sufficient skill

and creativity to use more than one package as well as different amounts to place in each package. *See, KSR Int'l*, 127 S.Ct. at 1742. We determine that one skilled in the art would find claim 19 obvious over Institutional Distribution in view of Pichardo. Therefore, we determine that Appellant has failed to show that the Examiner reversibly erred in rejecting claim 19 as obvious, and the rejection of claim 19 under 35 U.S.C. § 103(a) is sustained.

Claims 2, 3, 10 and 21

Appellant separately argues the patentability of claims 2, 3, 10, and 21. These claims are limited to containers or bags of sugar containing pre-measured quantities, in amounts ranging from 1/8 cup to 1 cup. Appellant argues that Institutional Distribution only discloses packets containing quantities equivalent to two teaspoons. App. Br. 8. Appellant acknowledges, though, that Star Tribune discloses a packet of sugar containing $\frac{1}{2}$ cup. *Id.*

The Examiner argues that the quantity or amount of sugar contained in each packet is an obvious matter of choice. Once it is known to provide products in pre-determined quantities, so that the product doesn't require further measurement before use, the particular volume amount of the brown sugar is seen to have been an obvious matter of choice and an obvious function of the food to which the sugar is added. Ans. 11.

We agree with the Examiner. As already taught in Pichardo, an object of that invention was to provide a package containing ingredients without requiring the measurement of individual portions, and wherein the amounts of the ingredients contained therein are premeasured. Accordingly, Pichardo notes that it is possible with the arrangement shown for a person to add $\frac{1}{2}$, 1/1-1/2 or 2 teaspoons of sugar or their equivalents. FF 2. Pichardo provides

a suggestion or reason to provide sugar packaged in pre-measured quantities in various sizes, depending upon the needs or desires of the consumer. We determine that the actual quantities used are a matter of choice, depending on the particular market served.

Appellant argues that Pichardo is not applicable, because it teaches packages of white sugar, along with creamer, and coffee, rather than brown sugar. As previously determined, Pichardo is analogous art, *supra*. Further, an obviousness analysis “need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, 127 S.Ct. at 1741. We determine that substituting brown sugar for white sugar in the disclosures of Pichardo would be within the normal creativity of one skilled in the art.

Wherefore, we determine that Appellant has failed to show the Examiner reversibly erred in rejecting claims 2, 3, 10, and 21 as obvious, and sustain the rejection of these claims under 35 U.S.C. § 103(a).

Claim 9

Appellant traverses the rejection of claim 9 under 35 U.S.C. § 103 by arguing that Institutional Distribution only discloses 2 tsp. packets, whereas claim 9 requires a plurality of different sized portions. App. Br. 8. Appellant also points out that Star Tribune discloses “only at most ½ cup portions.” *Id.* However, the test for obviousness is what the *combined* teachings of the references would suggest to those of ordinary skill in the art. *In re Young*, 927 F.2d 588, 591 (Fed. Cir. 1991); *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Whether or not an individual reference teaches a specific step of the claimed method is not dispositive

of the question of obviousness. Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references. *In re Merck*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Appellant, however, fails to point out that even he identified that Pichardo discloses “two compartments of different sizes . . . so that one could add ½ tsp., 1 tsp., or 1-1/2 tsp. of sugar.” App. Br. 9. Institutional Distribution discloses all elements of claim 9 except the plurality of different sized portions. Pichardo discloses a packaging system comprising a plurality of different sized portions, i.e., ½ and 1 tsp., of sugar. FF 2. Accordingly, we agree with the Examiner that it would have been obvious to one of ordinary skill in this art to use a plurality of different size portions of packaged sugar, as taught by Pichardo, in the article of Institutional Distribution, to offer the consumer a choice of amounts of sugar. Appellant has failed to show that the Examiner reversibly erred in rejecting claim 9 as obvious, and therefore we sustain the Examiner’s rejection under 35 U.S.C. § 103(a).

Claim 24

Claim 24 depends on claim 19, further limited to a plurality of bags which are joined end to end in a chain. The Examiner relies on Pichardo, which the Examiner asserts establishes that providing packages connected end-to-end is well-known, and that such an arrangement is “notoriously conventional” when using conventional form, fill and seal equipment. We agree. FF 2. Appellant has failed to show the Examiner reversibly erred in

rejecting claim 24 as obvious, and the rejection of claim 24 under 35 U.S.C. § 103(a) is sustained.⁵

Claims 22 and 23

Appellant does not present any argument traversing the rejection of claims 22 and 23, and therefore waives any consideration by the Board of such arguments. 37 C.F.R. § 41.37(c)(1)(iv). The rejection of claims 22 and 23 is sustained for the reasons stated above and in the Answer.

Secondary Considerations

Appellant contends that secondary considerations exist rebutting the Examiner's determination of obviousness. As we interpret his arguments, Appellant contends that the marketing of cooking ingredients in pre-measured quantities that correspond to useful amounts is essentially unknown, except possibly for butter and cream. *See* App. Br. 8. We disagree. A product's novelty in the marketplace is not necessarily relevant to legally accepted secondary considerations. Various factors may deter or inhibit a certain product idea from the marketplace, many of which are economic and not related to innovation. Regardless, Appellant has not shown any nexus between this secondary consideration and his invention. Further, Appellant has not alleged or shown evidence, e.g., of rapid commercial success of this product, or of any other secondary considerations generally accepted in the case law.

⁵ In the Appeal Brief, claim 24 is distinguished from various prior art references individually. Appellant, however, does not argue or point to any error of the Examiner in finding the combination of Institutional Distribution, as applied to claim 19, in view of Pichardo, as obvious to a person of ordinary skill in the art, the basis for the present rejection.

Appellant also contends that the development of “brownulated” sugar in 1966 demonstrates a long felt need. App. Br. 8. We again disagree. The development of “brownulated” sugar appears to represent an improvement in the handling of brown sugar, which has a tendency to clump and cake. It does not, however, show a long-felt need relating to measuring out smaller, pre-determined quantities, based on firmly-packed volume, of brown sugar from a bulk container, and as now claimed by Appellant.

For the foregoing reasons, we do not find Appellant’s contentions of secondary considerations to be persuasive.

CONCLUSION

In summary, Appellant has failed to show that the Examiner reversibly erred in rejecting the pending claims under 35 U.S.C. § 103(a) over the cited prior art references, and has not established secondary considerations of non-obviousness. Accordingly, we affirm the sole ground of rejection presented for review in this appeal.

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

PL Initial:
sld

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